Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

FINAL AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 04-004509

Employee: Dwight McIver

Employer: Trailliner Corporation

Insurer: Alea North America Insurance Company

Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 28, 2011. The award and decision of Administrative Law Judge Victorine Mahon, issued December 28, 2011, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 14th day of June 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

DISSENTING OPINION FILED
James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I am convinced that the decision of the administrative law judge assessing liability for employee's permanent total disability against the employer is in error, and that the decision should be modified to award permanent total disability benefits from the Second Injury Fund.

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there has been previous disability." The Fund is liable for permanent total disability benefits where the work injury combines with a prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007).

This 67-year-old employee worked for employer for about two years before suffering a work injury on January 15, 2004. Prior to the January 2004 work injury, employee suffered a longstanding history of headaches and neck pain related to preexisting cervical spondylosis at C5-6 and C6-7. Employee's preexisting cluster headaches were so severe that he underwent a radiofrequency and denervation procedure in August 1990. Employee's preexisting neck complaints included radiating pain down the right arm and numbness and tingling in three fingers of the right hand. In 1992, following an MRI which revealed cervical spondylosis at C5-6 and C6-7 with narrowing at foramina C5 and C6 on the right, treating doctors recommended that employee undergo an anterior cervical discectomy and fusion. Despite his doctors' recommendations, employee declined to undergo this procedure. Between November 4, 1998, and February 21, 2002, employee received chiropractic treatment on no less than 43 occasions at the Shell Knob Chiropractic Clinic. Employee's symptoms included headaches, neck pain with stiffness, shoulder pain, and upper back pain.

On January 15, 2004, employee was working for employer when he slipped while crossing a snow-covered parking lot and fell on his right shoulder and neck. Treating doctors diagnosed cervical, shoulder, and back strains. Employee underwent conservative treatment but continued to complain of neck pain and discomfort. Diagnostic studies revealed severe stenosis at C4-5 and C5-6, and advanced degenerative disease at C6-7. On June 9, 2004, Dr. Harbach performed an anterior cervical decompression/discectomy and fusion to address the stenosis in employee's neck. Employee returned to work and reported to Dr. Harbach on August 12, 2004, that he was doing well post-operatively with only intermittent twinges down the left shoulder. On January 17, 2005, employee underwent a functional capacity evaluation (FCE). The results of the FCE demonstrated that employee was capable of performing physical work at the medium level. On February 3, 2005, Dr. Harbach released employee at maximum medical improvement, rated his permanent partial disability at 38% of the body as a whole, and opined that employee was capable of performing full-time work at the medium demand level.

Dr. Truett Swaim evaluated employee at the request of employee's attorney. Dr. Swaim opined that employee is permanently and totally disabled as a result of the work injury in combination with employee's preexisting permanently partially disabling conditions, including his headaches and a prior left knee surgery. Dr. Swaim specifically opined that employee is not permanently and totally disabled as a result of the last injury considered in isolation. The administrative law judge rejected Dr. Swaim's opinion, however, in favor of that of the vocational expert Philip Eldred, who opined that employee is permanently and totally disabled as a result of the last injury considered alone. But, Mr. Eldred admitted that he ignored employee's preexisting disabilities and relied on employee's representation that he was in "excellent" condition prior to the January 2004 work injury. As demonstrated at the hearing before the administrative law judge, where employee had to concede on cross-examination that he was suffering from the same type of severe headaches before the work injury as after, Mr. Eldred relied on a history that substantially departs from the actual facts of this case. Employee's condition cannot reasonably be described as "excellent" before the work injury where doctors had recommended he undergo neck surgery as far back as 1992, and where employee regularly visited a chiropractor for treatment in connection with the same symptoms that he now would have us attribute solely to the work injury.

I disagree with the administrative law judge's (and the majority's) choice to credit Mr. Eldred. I credit instead Dr. Swaim and find that employee is permanently and totally disabled due to a combination of the 2004 work injury and his preexisting conditions of ill. I would modify the decision of the administrative law judge and award permanent total disability benefits from the Second Injury Fund.

Because the majority has determined otherwise, I respectfully dissent.

James G. Avery, Jr., Member

Issued by Missouri Division of Workers' Compensation

AWARD

Employee: Dwight McIver

Injury No. 04-004509

Dependents: Not Applicable

Employer: Trailliner Corporation

Additional Party: Treasurer of Missouri as Custodian of the Second Injury Fund

Insurer: Alea North America Insurance

Before the
DIVISION OF WORKERS' COMPENSATION
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Hearing Date: October 21, 2011

Checked by: VRM/db

FINDINGS OF FACT AND RULINGS OF LAW

1. Are benefits awarded herein? Yes.

2. Was the injury or occupational disease compensable under Chapter 287? Yes.

3. Was there an accident or incident of occupational disease under the Law? Yes.

4. Date of accident or onset of occupational disease: January 15, 2004.

5. State location where the accident occurred or occupational disease was contracted: Frankfort, Indiana.

6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.

7. Did employer receive proper notice? Yes.

8. Did accident or occupational disease arise out of and in the course of the employment? Yes.

9. Was claim for compensation filed within time required by Law? Yes.

10. Was employer insured by above insurer? Yes.

11. Describe work employee was doing and how accident occurred or occupational disease was contracted: Claimant fell on ice while walking to his truck.

12. Did accident or occupational disease cause death? No. Date of Death: N/A

13. Part(s) of body injured by accident or occupational disease: cervical spine and lumbar spine.

14. Nature and extent of any permanent disability: Permanent and total disability.

15. Compensation paid to date for temporary disability: $22,919.73.

16. Value necessary medical aid paid to date by employer/insurer? $87,639.46.

17. Value necessary medical aid not furnished by employer/insurer? None.

18. Employee's average weekly wages: $674.89

19. Weekly compensation rate: $449.88 (TTD/PTD) and $347.05 (PPD).

20. Method wages computation: Agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: Permanent Total Disability.

22. Second Injury Fund liability: None.

23. Future requirements awarded:

    Beginning February 3, 2005, and continuing for the remainder of his lifetime, subject to review and modification as provided by law, Employer/Insurer shall pay Claimant permanent total disability in the weekly sum of $449.88.

    Employer/Insurer also shall provide future medical care to cure and relieve the effects of the work injury. Employer retains the right to select the medical care provider.

    The compensation awarded to the Claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the Claimant: C.J. Moeller.

FINDINGS OF FACT AND RULINGS OF LAW

Employee: Dwight McIver Injury No. 04-004509

Dependents: Not Applicable

Employer: Trailliner Corporation

Additional Party: Treasurer of Missouri as Custodian of the Second Injury Fund

Insurer: Alea North America Insurance

Before the
DIVISION OF WORKERS' COMPENSATION
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Hearing Date: October 21, 2011 Checked by: VRM/db

Introduction

The parties appeared before the undersigned Administrative Law Judge for a final hearing on October 21, 2011, in Springfield, Greene County, Missouri. C.J. Moeller represented Dwight McIver (Claimant). Ryan Murphy represented Trailliner Corporation, insured by Alea North America Insurance Company, c/o Gallagher Bassett Services, Inc. (Employer/Insurer). Assistant Attorney General Susan Colburn represented the Treasurer of Missouri, as Custodian of the Second Injury Fund. The parties stipulated to the following facts:

Stipulations

On January 15, 2004, Trailliner Corporation was an employer operating under and subject to the terms and provisions of the Missouri Workers' Compensation Law, and during this time was fully insured by Alea North America Insurance Company, in care of Gallagher Bassett Services. On that date, Dwight McIver was an employee of Trailliner Corporation and working under and subject to the Missouri Workers' Compensation Law. On that same date, Dwight McIver sustained an injury by accident in Frankfort, Indiana, which arose out of and was within the course of his employment with the employer. The parties agree to venue in Springfield, Missouri. There is no dispute as to jurisdiction, venue, or the statute of limitations. Claimant's average weekly wage was $674.89, yielding a compensation rate of $449.88 for temporary total and permanent total disability compensation, and a compensation rate of $347.05 for permanent partial disability compensation. Employer/Insurer paid temporary disability benefits in the amount of $22,919.73, and medical aid in the amount of $87,639.46. The parties stipulate that the following are the sole issues for resolution:

Issues

1. Did the accident cause the injuries and disabilities for which benefits are now being claimed?

2. Did Claimant sustain any permanent disability as a consequence of the accident; and, if so, what is the nature and extent of the disability?

3. Does the Second Injury Fund have liability for enhanced permanent partial disability or permanent total disability benefits?

4. Is Claimant entitled to future medical care to cure and relieve the effects of the injuries?

Exhibits

Claimant offered the following exhibits which were admitted:

A1. Independent Medical Examination – Truett L. Swaim, M.D.
A2. Rehabilitation Consultation and Evaluation – Phillip Eldred, M.S., C.R.C.
A3. Curriculum Vitae – Phillip Eldred, M.S., C.R.C.
B1. Deposition Transcript – Truett L. Swaim, M.D.
B2. Deposition Transcript – Todd Joseph Harbach, M.D.
C1. Medical Records: Harold A. Smart, D.O.
C2. Medical Records: SNSI
C3. Medical Records: St. John's Clinic – Orthopedic Specialists
C4. Medical Records: Concentra
C5. Medical Records: St. John's Health Center
C6. Medical Records: St. John's Hospital – Aurora
C7. Medical Records: Physical Therapy Care
C8. Medical Records: Bluff Radiology Group
C9. Medical Records: Kneibert Clinic

Employer/Insurer offered the following exhibits which were admitted:

1. FCE Report: 1/17/05 – Physical Therapy Care
2. Vocational Evaluation Report: 3/15/11 – Bud Langston
3. Deposition Transcript – Bud Langston: 6/28/11
4. Medical Records: Todd Harbach, M.D.
5. Deposition Transcript – Dwight McIver: 7/3/06
6. Deposition Transcript – Dwight McIver: 5/21/10
7. Medical Records: Peter Richardson, D.O.
8. Deposition Transcript & Exhibits – Ted Lennard, M.D.: 5/27/08
9. Medical Records: H.S. Majzoub, M.D.
10. Medical Records: Harold A. Smart, D.O.
11. Medical Records: Shell Knob Chiropractic
12. Medical Records: Dr. David Paff
13. Universal Pain Assessment Tool

The Second Injury Fund offered the following exhibits which were admitted:

I. Vocational Evaluation Report: James England
II. Deposition Transcript – James England

FINDINGS OF FACT[1]

Claimant Dwight McIver is 67 years old. He holds a high school diploma and a certification in bookkeeping that he accomplished in 1963. He is married and lives with his wife and mother. Claimant went to work for Trailliner Corporation in January 2003. He remained employed there through January 2005, primarily as a truck driver, although he also worked in the parts department performing light duty work after his accident. Claimant was terminated when it became evident he no longer could drive a truck. He has not looked for work since then.

Claimant has a varied work background. He previously worked at Leggett and Platt, and quit there after vesting in his retirement. He has worked in a warehouse and on an assembly line. For at least five years he operated his own business called DNR Custom Blinds, conducting sales, ordering materials, installing blinds, and providing customer service. Prior to operating the retail blind business, Claimant worked for Joplin Diesel Services managing its tractor-trailer repair and parts department. At one time he also operated a service station. A major portion of his life, however, has been spent in the trucking business. He has worked in management or as a truck driver for a number of companies.

On January 15, 2004, Claimant was in Frankfort, Indiana picking up a load for Employer. It was snowing that day. As he walked across the parking lot carrying paperwork for the load, he slipped and fell onto his right shoulder and neck. He felt pain in his neck and back but was able to get up and get into his truck. He notified Employer of the fall, and that he was physically capable of completing his trip and returning to Springfield, Missouri. He returned to Springfield after business hours that evening.

Medical Treatment for Accident of January 15, 2004

On January 16, 2004, Claimant went to Concentra Medical Center. He was diagnosed with strains of the neck, back and right shoulder and restricted from truck driving. He then had an appointment with Dr. Ted Lennard on February 9, 2004, who assessed cervical/thoracic strain and cervical degenerative changes. Dr. Lennard also restricted Employee from commercial truck driving. On March 31, 2004 Dr. Jeff Woodward performed a right and left C5-6 and C6-7 zygopophyseal steroid injection under fluoroscopy. On April 8, 2004, Claimant returned to Dr. Ted Lennard reporting less pain but continued discomfort with cervical extension and flexion. Claimant was released to full activities other than occupational driving due to discomfort with motion of the cervical spine. On April 23, 2004, Claimant returned to Dr. Lennard with continued cervical discomfort with flexion and extension. Due to the ongoing complaints, Dr. Lennard referred Claimant to Dr. Todd Harbach.

Dr. Todd Harbach examined Employee on May 14, 2004. He diagnosed cervical pain/spondylosis, mild fascial pain, bilateral upper extremity radicular pain without evidence of myelopathy, and severe stenosis at C4-5, C5-6 and C6-7. On June 9, 2004 Dr. Harbach performed a C4-5, C5-6, C6-7 anterior cervical decompression/discectomy and fusion; tricortical allograft bone graft times three; anterior cervical internal fixation, C4-C7; with continuous spinal

[1] All objections are ruled in a manner consistent with this Award. Any marks in the exhibits were made prior to their receipt into evidence and were not made by the Administrative Law Judge.

cord monitoring. Employee continued to follow up with Dr. Harbach. On November 18, 2004, Dr. Harbach assessed worsening cervical pain related to increased activity; resolution of cervical myelopathy and radiculopathy; cervical pain; cervical spondylosis; low back pain; and lumbar spondylosis. He noted that if Employee could not return to work he would have to consider applying for disability.

Claimant performed some work for Employer prior to his final rating and release by Dr. Harbach, but it was not enough to keep him busy. He sorted fasteners and did some sweeping. He could perform his duties only if he was allowed to sit.

On December 23, 2004, Claimant reported to Dr. Todd Harbach of a flare up of his symptoms. Dr. Harbach assessed cervical pain, cervical spondylosis, thoracolumbar back pain and degenerative changes of the thoracolumbar spine. Dr. Harbach found Claimant did not require further surgical intervention at that time. Dr. Harbach ordered a functional capacity evaluation (FCE). He told Claimant that he probably would have to retire or stop working and apply for Social Security Disability.

On January 17, 2005, Gerry Catapang of Physical Therapy Care performed the FCE. He concluded that Claimant could sustain work at the medium exertional level for an eight-hour day. Claimant said after the FCE he felt horrible because of pain and a headache. Dr. Harbach rated and released Claimant on February 23, 2005, consistent with the FCE.

Current Complaints

Claimant testified he is no longer able to work due to neck pain with headaches, right shoulder pain and back pain which originated from the accident of January 15, 2004. Claimant's daughter and spouse verified that Claimant has frequent headaches, for which he takes prescribed medication. Some days no matter what he takes, nothing gets rid of the headaches. These throbbing headaches increase with intensity throughout the day and did not begin until the work accident in January 2004.

Claimant must lie down most days for an hour or more. On a bad day he has to lie down a couple of times. He can sit longer if he has neck support. He cannot read for long periods of time. Looking down at a book or magazine strains his shoulders. If he is having a bad day he tries not to read at all.

Claimant cooks several nights a week, particularly smoking or grilling meat. He is able to mow a one-half acre lot on a riding lawn mower in about 30 minutes. He has shoveled snow form his sidewalk. He has no cognitive deficits and is capable of handling his personal finances. He can travel up to two hours. At the time of the hearing, Claimant said he was suffering a headache from the drive to Springfield. Claimant can play computer games or watch a Cardinal baseball, game if he is positioned directly in front of the television so he does not have to move his neck (Ex. 6, p. 40). He can fish for three or four hours at a time, but does not cast from the shoulder. He is able to hitch the boat trailer to the pickup truck and launch the boat by himself, but needs help pulling it out. Claimant enjoys hunting. He can shoot a rifle, but not repeatedly, as in trap shooting. There is conflicting evidence as to whether he actually performs the field dressing of the deer. Claimant's hobbies also include refinishing guns and performing minor repair work on

lawn mowers on a very part-time basis. He can sit and work on something for an hour to one and one-half hours if he is using his shoulders. Claimant can walk one-half of a mile.

Terri Triplett, Claimant's daughter, and Rita McGiver, Claimant's wife, testified credibly. They substantiated Claimant's testimony.

Preexisting Conditions

Prior to his fall at work on January 15, 2004, Claimant received treatment for headaches, hypotension with fatigue and lightheadedness, cervical spondylosis at C5-6 and C6-7 and arthroscopic surgery of the left knee.

1. Pre-existing Headaches:

On August 30, 1990, Claimant underwent a radiofrequency lesion and denervation procedure to treat cluster headaches. Though Employee has an occasional, isolated "light" headache, the cluster headaches have not recurred. Employee's medical records showed a doctor's visit for what was described as a cluster headache in 1998. Dr. Peter Richardson prescribed Tiazac for hypertension and headaches. Claimant presented to Dr. Harold Smart on May 26, 1998, complaining of headaches (Ex. 10, p. 26). On several occasions in November and December 1998, Claimant presented to the Shell Knob Chiropractic complaining of neck pain with headaches, and shoulder and upper back pain (Ex. 11, pp. 2-3). Despite these medical records, Claimant and his wife and daughter contend that after his August 30, 1990 denervation procedure, he did not experience bothersome headaches. Claimant was able to continue commercial driving despite these medical records showing some complaints of headaches. I find that whatever headaches Claimant was experiencing after the denervation procedure, they were infrequent and did not serve as a hindrance or obstacle to employment or reemployment.

2. Pre-existing Cervical Spondylosis:

On October 27, 1989, Claimant presented to Dr. Harold Smart complaining of a head injury when he was rear-ended by a semi truck causing him to strike his head on the back of his sleeper resulting in mild tenderness in the cervical spine. On April 29, 1992, Claimant presented to Dr. Harold Smart reporting right shoulder pain for the previous two weeks at the cervical thoracic junction radiating down the right extremity. Dr. Smart assessed a cervical dorsal strain with spasm and radiculopathy. On May 4, 1992, Claimant returned to Dr. Smart with continued cervical thoracic junction pain radiating down into the right arm with numbness and tingling in three fingers of the right hand. Dr. Smart ordered a cervical MRI.

On June 26, 1992, Claimant presented to Dr. Majzoub at Joplin Neurosurgical Associates complaining of neck pain with radiation down the right arm to the hand. Claimant complained of tingling and numbness in the first three fingers. A review of the MRI performed on May 6, 1992, revealed cervical spondylosis at C5-6, C6-7 with narrowing at foramina C5 and C6 on the right. Dr. Majzoub diagnosed cervical spondylosis at C5-6 and C6-7 and recommended an anterior cervical discectomy and fusion (Ex. 9, p. 5). Claimant did not have the procedure. Dr. Swaim opined that the surgical intervention at that juncture would have been premature.

As noted above, Claimant was seen at the Shell Knob Chiropractic with multiple complaints, including neck pain and stiffness, neck pain with headaches, shoulder pain, and upper back pain. (Ex. 11, pp. 2-3). Between November 4, 1998 and February 20, 2002, Claimant received multiple chiropractic treatments. The complaints in the Shell Knob Chiropractic records are similar to those Claimant alleges are the result of the work related accident.

3. Pre-existing Hypotension:

On May 26, 1998, Claimant presented to Dr. Harold Smart complaining of dizzy spells and passing out. Dr. Harold Smart referred Claimant to Dr. Bryan Weinshenker. Claimant presented to Dr. Weinshenker complaining of orthostatic dizziness and shortness of breath on June 23, 1998. Claimant reported that in mid February 1998, while performing heavy lifting at work, he became lightheaded and queasy, was unable to walk straight, and was forced to lie down. On July 20, 1998, Dr. Weinshenker diagnosed Claimant with orthostatic dizziness of uncertain etiology. The evidence fails to suggest that this condition caused ongoing interference with Claimant's ability to work.

4. Pre-existing Left Knee Injury:

Claimant had arthroscopic left knee surgery in the 1980s. He recovered from the surgery with only some occasional knee pain. While he was able to perform his job duties of a truck driver, he accommodated his injury by learning how to shift gears without using the clutch. He took over-the-counter Tylenol for pain,if needed. Claimant said the knee injury did not keep him from walking as far as he wanted. Claimant's wife, Rita McGiver, testified that the left knee surgery gave Claimant no residual difficulty. I find that the left knee injury did cause Claimant ongoing permanent disability, but it did not hinder or serve as an obstacle to his current or potential future employment.

5. Eye Surgery

In 1990 Employee had left eye surgery. His vision in that eye remained a little blurry, but he was able to pass the D.O.T. physical. This did not hinder his ability to work as a truck driver or other potential employment.

Purported Inconsistent Evidence

Claimant testified he had been completely free of cluster headaches following the radiofrequency lesion denervation procedure performed on August 30, 1990. Employer/Insurer make much of the medical records indicating that Claimant had a recurrence of headaches beginning in 1998, and received treatment from Dr. Richardson at that time, as well as treatment at the Shell Knob Chiropractic in 1998. Claimant saw Dr. Harold Smart on May 26, 1998, complaining of recurrent problems with headaches. Dr. Majzoub also reported on June 30, 1992, that Claimant suffered from cervical spondylosis. He offered the option of surgery, which Claimant did not accept. To the extent that Claimant's testimony conflicts with these medical and chiropractic records, I accept the records as more reliable.

I find that Claimant did have some complaints of neck pain and headaches between August 1990 and the work accident in January 2004. These complaints differ from the cluster headaches which had been treated earlier and had essentially resolved. Any headaches Claimant experienced between August 1990 and January 2004, appear to be infrequent and of less severity. While expert testimony in the record indicates that the preexisting spondylosis would not have resolved, Claimant obviously declined surgical intervention, but still was able to continue working without interruption or accommodation.

Expert Evidence

1. Dr. Todd Harbach

The treatment provided by Dr. Todd Harbach is detailed above. Dr. Harbach testified that Claimant suffered cervical pain and degenerative changes or spondylosis, myofacial pain, as well as severe stenosis at three levels in his neck. Dr. Harbach, the surgeon who performed a C4-5, C5-6 and C6-7 anterior cervical decompression, discectomy and fusion, testified that Claimant's fall on the ice in January 2004 was a substantial factor in triggering the complaints Claimant had based on the history provided.

On February 3, 2005, after receiving the FCE report, Dr. Harbach, rated Claimant as having a 38 percent permanent partial disability to the whole body. He said Claimant suffered a DRE cervical category number five, which reflects the worst of five categories. He said he rated Claimant in that manner because he had decreased range of motion, still suffered significant muscular neck and thoracolumbar back pain, and chronic residual arm pain. Dr. Harbach said at no time did Claimant ever give him any reason to question the authenticity of his complaints. Dr. Harbach said in this case it was his opinion that Claimant would have a lot of difficulty obtaining and maintaining employment in the job market.

As to future medical requirements, Dr. Harbach said Claimant required ongoing anti-inflammatories and pain medications, and visits with physical medicine and rehabilitation doctors or pain clinic. He also said that Claimant may need a decompression and fusion from the rear to assure that he is adequately decompressed and to address remaining bone spurs.

2. Dr. Ted Lennard

Claimant treated with Dr. Ted Lennard for complaints of neck and right shoulder pain following his fall at work on January 15, 2004. On November 1, 2006, Dr. Lennard prepared a report for purposes of providing a disability rating. Dr. Lennard's report notes Claimant denies any pre-existing problems with his neck prior to Claimant's slip and fall accident on January 15, 2004. (Ex. 8, page 24). Dr. Lennard reviewed the June 26, 1992, Joplin Neurosurgical Associate records of Dr. Majzoub which revealed spondylosis at C5-C7 with the accompanying recommendation for an anterior cervical discectomy and fusion. Still, Dr. Lennard opined the work accident of January 15, 2004, was the prevailing factor in causing the onset of the cervical complaints and need for the cervical fusion performed by Dr. Harbach. Dr. Lennard found Claimant suffered 20 percent disability to the body as a whole at the cervical spine. He also found a five percent permanent partial disability to the body as a whole at the lumbar spine attributable to the work injury of January 15, 2004. Dr. Lennard found a preexisting disability of

10 percent to the body as whole as a result of Claimant's preexisting cervical spondylosis, with an additional 5 percent to the body as a whole at the lumbar spine due to preexisting degenerative changes. From a functional standpoint, Dr. Lennard found Claimant should avoid lifting greater than 20 pounds and should avoid work in the overhead position.

3. Dr. David Paff

On December 9, 2004, Claimant presented to Dr. David Paff for a medical opinion regarding his cervical spine. Dr. Paff reviewed the MRI of Claimant's cervical spine performed on January 30, 2004, as well as the treatment records of Dr. Lennard and the operative report of Dr. Harbach. Dr. Paff opined that while Claimant would be unable to return to his work as a truck driver, Claimant was capable of performing work at the light exertional level if it did not involve moving his neck on a regular or extreme basis.

4. Dr. Truett Swaim

Dr. Truett Swaim performed an independent medical evaluation on January 10, 2006. Dr. Swaim opined that the injury of January 15, 2004, was the prevailing and substantial contributing factor causing 50 percent permanent partial disability of the body as a whole at the cervical spine and 20 percent disability to the body as a whole at the lumbar spine. Dr. Swaim opined Claimant had a preexisting 40 percent permanent partial disability of the left leg at the knee due to prior arthroscopic surgery, and a preexisting 20 percent permanent partial disability to the body as a whole due to preexisting headaches. Dr. Swaim found the combined effects of Claimant's last injury and preexisting injuries created an enhancement of Claimant's overall disability. He believed that Claimant was permanently and totally disabled due to the combined effects of the last injury and pre-existing injuries, and not from the last injury in isolation.

Dr. Swaim gave no rating for a preexisting spondylosis because Claimant continued to perform his regular duties as a truck driver and reported no ongoing difficulty. Dr. Sawim also explained that he gave his rating for preexisting headaches based on the trigeminal neural lysis. The procedure would have affected Claimant's vision, as well as mastication since it has an effect on the muscle in the jaw. Dr. Swaim recalled that it was "pretty obvious" that Claimant had some numbness to the side of his face. Dr. Swaim said Claimant's current headaches are related to neck pain rather than cluster headaches.

Vocational Opinions

1. James England

James England issued a vocational rehabilitation evaluation report on behalf of the Second Injury Fund. Mr. England testified by deposition on May 10, 2010, during which he acknowledged that Claimant can perform work in the sedentary to light physical exertional levels. He believed that Claimant could return to work as a terminal manager, a parts' manager, a truck dispatcher, or as a service manager as he performed in the past. Mr. England also found Claimant could work in a variety of entry level service employment at the sedentary to light levels of exertion such as cashiering positions, security work, or small products assembly. Mr. England believed Claimant's activities around the home would be consistent with the light exertional level, and he

felt this was significant because it showed Claimant was not inert, and that level of activity could correlate to a job setting. He acknowledged, however, that he had no information as to how much time Claimant spent in a day doing chores, yard work or hobbies. He could not state, therefore, if Claimant's activity level at home was consistent with someone working eight hours per day, five days per week.

Mr. England noted that if Claimant could not work because of ongoing pain, his inability to work would be the result of the last injury alone. He noted that Claimant made it clear that he had no ongoing medical problems which interfered with his ability to work before the last injury. Regarding Claimant's pain complaints, Mr. England agreed that Dr. Harbach's statement that Claimant should file for Social Security Disability indicated the physician's belief that Claimant had significant pain complaints. Mr. England also agreed that Claimant would have difficulties staring at a computer screen with a fixed gaze if it caused him pain.

2. Bud Langston

Bud Langston is a vocational rehabilitation counselor with 36 years of experience. Mr. Langston opined that Claimant would be able to work at the light exertional level if he could sit and stand as needed. He believed Claimant could work as a terminal manager, as he had done previously. He testified that there were other management positions within Claimant's capabilities, which may require some training. He acknowledged that Claimant's knowledge of a computer was very limited; most companies now use computers in some manner, and that management personnel tend to use computers in their jobs.

Mr. Langston identified positions that he believed were within Claimant's physical capabilities. These included semi-skilled or unskilled positions in the trucking industry, or at a welcome center, conversing with people passing through and giving directions.

Mr. Langston admitted that no preexisting medical condition interfered with Claimant's ability to work before the last injury, though he opined that Claimant potentially could have been terminated from his truck-driving job for shifting without using the clutch. He agreed that there was no indication that Employer ever admonished or disciplined Employee for this practice. Mr. Langston also was not sure if the light duty work Claimant did for Employer after his surgery was a special accommodation as opposed to a job that really existed. He agreed that Claimant's seven year absence from the labor market made re-entry into labor market more difficult. Mr. Langston noted in his report that he did not take into account Claimant's pain based on his belief that the physicians did not indicate that Employee was limited vocationally by his pain.

3. Phillip Eldred

On November 5, 2010, Philip Eldred, a certified vocational rehabilitation counselor, issued his evaluation report on behalf of the Claimant. Mr. Eldred found Claimant to be permanently and totally disabled as a result of his injury of January 15, 2004, in isolation. Mr. Eldred looked at Claimant's vocational history over the preceding 20 years. He noted that most of Claimant's work experience had been as a truck driver.

At hearing, Mr. Eldred explained that he uses the most restrictive medical opinion in determining the extent of an employee's disability. Mr. Eldred conceded that Claimant could perform work at the light exertional level if one considered the restrictions imposed by doctors other than Dr. Swaim. Mr. Eldred found multiple jobs that Claimant was capable of performing if he could perform work at the sedentary work level, and even more if he could perform at the light level of work. Mr. Eldred noted, however, Dr. Swaim's restrictions from the last injury, alone, placed Claimant at a less than sedentary exertional level due to the need to alter positions. If the only restriction was the need to sit, Claimant would be at the sedentary exertional level. Claimant had told Mr. Eldred that he was in good condition before the last injury. He was only taking blood pressure medication, and was not missing work or reporting difficulty working. Mr. Eldred found no pre-existing restrictions.

Mr. Eldred did not agree with Dr. Swaim that Claimant was permanently and totally disabled from the last injury in combination with preexisting disabilities. Mr. Eldred's report states that Claimant did not have an impairment that was vocationally disabling prior to Claimant's injury of January 15, 2004. Mr. Eldred said Claimant's vocational difficulties in finding work include his lack of a college degree and lack of transferable job skills. Although he had managerial experience, Mr. Eldred said such experience was too far back to be of much value. Mr. Eldred further thought Claimant's pain would make concentration difficult. Mr. Eldred said Claimant reported his pain at between four and six on a ten-point scale.

Mr. Eldred acknowledged on cross-examination that Claimant did not report being able to fish three to four hours at a time or watch an entire baseball game. But, Mr. Eldred said such facts did not change his mind as to the degree of Claimant's disability because that is not comparable to being at work every day.

Credibility Assessment

I find that the opinions of Dr. Harbach, the treating surgeon, and that of the evaluating physician Dr. Swaim, to be the most credible and persuasive in this case with respect to the issues of causation and the degree of disability. Dr. Harbach, while rating Claimant at less than 40 percent permanent partial disability after receiving the results of the FCE, testified credibly that Claimant would have significant problems obtaining and maintaining employment. I agree. I further agree with Dr. Swaim as to causation and that Claimant is permanently and totally disabled. I disagree with Dr. Swaim that such degree of disability is attributable to a combination of disabilities both preexisting and from the last work injury. Moreover, I accept as credible the opinion of Mr. Eldred in this case that Claimant is permanently and totally disabled from the last accident in isolation, given his thorough interview with Claimant and review of relevant records. Mr. England's opinion bolsters that of Mr. Eldred that if Claimant is permanently and totally disabled, it stems from the last injury, alone. I specifically reject Bud Langston's vocational opinion because he did not fully consider the impact of Claimant's pain, ignoring that Dr. Harbach's diagnoses included intractable neck pain.

CONCLUSIONS OF LAW

The law in effect at the time of Claimant's last injury provides that the Workers' Compensation Act is to be broadly and liberally interpreted and doubts are to be resolved in favor of the injured

employee. § 287.800 RSMo 2000; *Cherry v. Powdered Coatings,* 897 S.W.2d 664 (Mo. App. E.D. 1995); *Wolfgeher v. Wagner Cartage Services, Inc.,* 646 S.W.2d 781, 783 (Mo. banc 1983). Applying this standard, and based on a comprehensive review of the substantial and competent evidence described above, including the testimony of Claimant, the medical opinions, the vocational opinions, depositions, as well as my personal observations of Claimant at the hearing, I make the following conclusions:

Medical Causation

Claimant bears the burden of proving a causal relationship between the accident and the claimed injury. *Griggs v. A.B. Chance Co.,* 503 S.W.2d 697, 703 (Mo. App. W.D. 1973). Medical causation, not within common knowledge or experience, must be established by scientific or medical evidence demonstrating the cause and effect relationship between the complained of condition and the asserted cause. *Brundage v. Boehringer Ingelheim,* 812 S.W.2d 200, 202 (Mo. App. W.D. 1991). Where the opinions of medical experts conflict, the fact finding body determines whose opinion is the most credible. *Kelly v. Vanta In Stude Construction Co., Inc.,* 1 S.W.3d 43, 48 (Mo. App. E.D. 1999). The fact finder may reject all or part of one party's expert evidence, which it does not consider credible and accept as true the contrary evidence presented by the other litigant. *George v. Shop and Save Warehouse Foods, Inc.,* 855 S.W.2d 460, 462 (Mo. App. E.D. 1993).

Based on all of the evidence in the record, I find and conclude that Claimant had an accident in the course and scope of his employment that resulted in injury to his cervical and lumbar spine.
I find in favor of Claimant on the issue of medical causation. Based on a review of Claimant's medical records and the opinion of the treating surgeon and the rating physician, Dr. Swaim, I conclude that the work accident of January 15, 2004, was a substantial factor in causing the onset of the cervical and lumbar complaints, as well as the need for the surgery performed by Dr. Harbach, and the residual disability to the body as a whole.

Extent of Permanent Disability

The most credible expert opinion in the record relating to the degree of disability from the last injury is that of Dr. Harbach, the treating surgeon. He opined that Claimant sustained a 38 percent permanent partial disability to the whole body attributable to the body as a whole. That opinion, however, cannot be read in isolation. Dr. Harbach further opined that Claimant would have a difficult time in obtaining and maintaining employment. He also had suggested that Claimant would need to stop working and draw Social Security Disability. Irrespective of the numerical value Dr. Harbach assigned to Claimant's physical disability, it is evident that he believed Claimant's disability was much more significant in terms of employability. Of course Dr. Swaim's opinion bolsters Claimant's contention that he is incapable of work in the open labor market.

I simply cannot agree with Dr. Lennard's ratings in this case. As Dr. Harbach noted, Claimant never gave him any reason to suspect that Claimant's complaints were less than authentic. Claimant's testimony, and that of his family, appeared very credible. Claimant can sit and watch baseball, but only if he doesn't turn his head. He lies down during the day. He has to vary his

position from sitting to standing. He suffers constant headaches related to neck pain. While he has supervisory experience, such experience is remote in time. And could he actually put that experience to work if he is unable to work day in and day out? While he performed some work for Employer subsequent to his surgery, Claimant's description of such duties suggest that it was merely "make work" and not a job available on the open labor market.

Certainly, one hurdle an employee must overcome is a FCE indicating he can work. But one day's effort does not necessarily translate into the ability to work full or even part time on a sustained basis. Claimant credibly testified to the physical discomfort he had subsequent to the FCE.

"Total disability means the inability to return to any reasonable employment….It does not require that the claimant be completely inactive or inert [citations omitted]." *Smith v. Richardson Bros. Roofing*, 32 S.W.3d 568, 573 (Mo. App. S.D. 2000) *overruled on other grounds,Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). This is a very close case. But given the law as it existed prior to August 28, 2005, Claimant's work restrictions, his need to rest during the day, coupled with his lack of relevant transferable skills, daily pain complaints, and age, I conclude he is permanently and totally disabled.

Second Injury Fund Liability

To establish liability of the Second Injury Fund, Claimant must show "either that (1) a pre-existing partial disability combined with a disability from a subsequent injury to create permanent and total disability or (2) the two disabilities combined to result in a greater disability than that which would have resulted from the last injury by itself." *Gasson v. Liebengood*, 134 S.W.3d 75, 79 (Mo. App. W.D. 2004). Claimant must then show that the combined effect of the last work related disability and the disability that is attributable to all conditions existing at the time of the last injury results in permanent total disability. *Boring v. Treasurer of Missouri, Custodian of the Second Injury Fund*, 947 S.W.2d 43, 49 (Mo. App. E.D. 1997) *overruled on other grounds, Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). The first finding the Administrative Law Judge must make is the degree of disability from the last injury considered alone. If the last injury in and of itself rendered the employee permanently and totally disabled, the inquire stops and the Second Injury Fund has no liability. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. banc 2003).

I conclude, based on the credible opinion of Mr. Eldred, Claimant is permanently and totally disabled from the last accident in isolation. The Second Injury Fund has no liability.

Future Medical Care

Section 287.140 RSMo 2000, requires an Employer/Insurer to provide medical treatment as reasonably may be required to cure and relieve an employee from the effects of the work related injury. The Claimant must prove the need for treatment by "reasonable probability." *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo. App. W.D. 1995) *overruled on other grounds, Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). "Probable" means founded on reason and experience, which inclines the mind to believe, but leaving room

for doubt. *Sifferman v. Sears Roebuck and Co.*, 906 S.W.2d 823, 828 (Mo. App. S.D. 1995), *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). To "cure and relieve" means treatment that will give comfort, even though restoration to soundness is beyond avail. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 249 (Mo banc 2003).

The medical experts agree Claimant will require additional treatment to cure or relieve the effects of Claimant's work injury. Employer shall provide the same. Employer retains the right to select the medical care provider.

Dr. Harbach released Claimant from his care and rated him on February 3, 2005. I conclude that Claimant reached maximum medical improvement as of that date. Beginning that date, Claimant is entitled to permanent total disability benefits at the weekly benefit amount of $449.88. Such benefits shall continue for the remainder of Claimant's lifetime, subject to modification and review as provided by law.

Claimant's attorney, C.J. Moeller, is awarded 25 percent of all benefits awarded as a reasonable fee for necessary legal services provided to Claimant. This fee shall be a lien on the proceeds until paid. Interest shall be paid as provided by law.

Made by: _____
Victorine Mahon
Administrative Law Judge
Division of Workers' Compensation